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UNCLAS SECTION 01 OF 03 OTTAWA 001168

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DEPT PASS USTR FOR CHANDLER AND ESPINEL
4320/ITA/MAC/WH/ONIA/ for GWORD

E.O. 12958: N/A

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SUBJECT: Canadian Reaction to GOC's Proposed Copyright Law Amendments

REF: 04 OTTAWA 893

1. (U) Summary: On March 24th, GOC released its highly anticipated response to the 2002 Heritage Committee report on the need for copyright reform. Many Canadian observers had hoped that the GOC's recent announcement would adequately address remaining IPR questions, but the government's goals for proposed legislation appear to fall short in key areas such as ISP liability and technological protection measure (TPM) circumvention: GOC is proposing 'notice and notice' rather than 'notice and takedown' and the proposed definition of TPM circumvention may require that rights holders prove the circumvention was with the intent to infringe. Overall, however, Canadian stakeholders are unable to clearly judge the impacts of the proposed amendments because the legislative text is not available and the details of the legislation will be critical. We expect renewed lobbying after the draft text of the legislation is available. End Summary.

The Devil's in the details, and he won't hold still

2. (U) We have spoken to a number of Canadian IPR stakeholders, including the Canadian Recording Industry Association, the Canadian Motion Picture Distributors Association, the Canadian Publishers Council, and the Entertainment Software Association to get their views on the substance of the GOC's announcement of intent to table broad legislation this spring to comply with WIPO obligations and address a number of other IPR issues. The draft text of the legislation is not yet available, and Embassy contacts suggest that it may be a long time coming; one senior official suggested that the GOC will not table a draft before June. All reactions to the proposed amendments thus far are based on three documents released by GOC in late March: a backgrounder, a statement, and a series of frequently asked questions. These documents are often vague, and industry analysts fear that the devil may be in the details that have not yet been drafted. For the GOC's full documentation on proposed amendments, see <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01140e.html>.

3. (U) Even between the three released GOC documents, there are differences. For example, the GOC's Backgrounder and FAQ clearly state that circumvention of TPM or alteration of rights management information (RMI) would constitute an infringement of copyright when done with intent to infringe, but the GOC's Statement seems to imply that 'enabling' infringement would also be illegal. Industry analysts who sought to clarify this difference have told us that they received contradictory answers depending on which agency they asked (Comment: Both Heritage Canada, which has traditionally supported IP rights holders, and Industry Canada, which tends to side more with free-use rights and promotion of new technologies, have responsibility for the content of this legislation, which will be drafted by Justice Canada. Frustrated industry analysts have described the relationship between the two policy-making agencies as dysfunctional, with Industry holding de facto veto power and Heritage over-willing to compromise. These observations are supported to some extent by Embassy experience with the agencies: at an IPR meeting hosted by the Embassy in December 2004, Heritage representatives seemed far more eager to move on the issue. End comment.)

Even hidden, the Devil scares rights holders

4. (U) What details can be found in the GOC's documents have rights holders associations alarmed. Various interlocutors have mentioned two items in particular as particularly threatening to intellectual property rights:

--Technological Protection Measures and Rights Management Information: The GOC's backgrounder and FAQ clearly imply that circumvention of TPM or alteration of rights management information would constitute an infringement of copyright only when done for infringing purposes. Most analysts are reading this as a reversal of the U.S. standard of burden of proof: rights holders would have to prove that the circumvention or alteration was intended to infringe, just the action would not be enough. Our contacts were discouraged by the GOC's apparent reluctance to outlaw devices that have no conceivable legal purpose, such as adaptors that allow video game players to play pirated games. (Comment: this is somewhat akin to a homeowner having to prove that a burglar not only picked the lock, but did so with the intent to steal. More than one analyst pointed out that this

would represent a step back in Canadian law, since sections 351 to 353 of the Criminal Code make it illegal to own breaking and entering tools, regardless of any proof of 'intent to infringe'.) As one interlocutor explained, if the rights holder has to prove infringement, this new language does not provide any new power to fight infringement assistance, since once infringement is proven, current law is sufficient to charge the infringer. Another industry analyst bemoaned the fact that this weakness in the law will mean that rights holders have no way of going after traffickers, but will be forced to continue suing users (as he put it: adding one more charge when the rights holder is stuck suing some kid is a PR nightmare.)

15. (U) Some rights holders associations are pinning their hope on a phrase in the GOC's 'Statement', which added the concept that circumventing TPM or altering RMI would constitute an infringement if the person acted to "enable or facilitate circumvention". This added phrase could cover the hacker who cracks RMI for fun and posts the information on the internet (that is, not profiting from the action but enabling others to profit.) However, this phrase does not appear in the rest of the documentation (the Background or the FAQs), and industry analysts tell us that attempts at clarifying the situation with Canadian Heritage or Industry have been met with confusion. Multiple industry reps mentioned that, without appropriate measures to counter trafficking, these amendments may not bring Canada into compliance with the WIPO treaties to which it is a signatory. (Comment: more than one expert referred us to a book by Mihaly Ficsor called "The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation", which provides a list of requirements to meet the WIPO treaties. According to industry reps, Ficsor's argument suggests that the weakness of GOC's amendments with regards to traffickers means that these amendments will not bring Canada into compliance with the WIPO Performances and Phonograms Treaty (WPPT). End comment)

Notice and Notice: If I've told you once, I've...told you once

16. (U) On the subject of notice and notice (as opposed to the preferred U.S. model of notice and takedown), industry opinions vary. Although some stakeholders have described the GOC's intent to instigate notice and notice as a major flaw of the proposed copyright amendments, local industry reps have suggested to us that, although industry groups will lobby for notice and takedown, internet file-sharing may have moved past the point where notice and takedown was once critically important. A year ago when Canada's supreme court issued a controversial decision describing peer-to-peer filesharing as legal, the filesharing profile of such programs as Napster involved large caches of files on individual websites; in this situation notice and takedown could prove beneficial in combating pirated downloads by requiring that ISPs remove these caches of files. However, the current popularity of such programs as BitTorrent and Grokster, where files are fragmented and not centrally located, means that notice and takedown may not be an effective tool to combat illegal downloads.

17. (U) However, the proposed notice and notice model provides little benefit to rights holders beyond ensuring documentation of their complaints to ISPs (comment: the documentation of complaints is useful, however, and some industry analysts fear that ISPs will lobby to remove even that responsibility as onerous. In addition, rights holders groups expressed concern at the GOC's open-ended statement that fees may be required to be paid by rights holders to ISPs for processing such notices. End Comment.) In discussing future lobbying options, one industry analyst explained that notice and notice could be helpful in combating peer-to-peer filesharing if the addition of a 'cease and desist' clause could be negotiated. That is, if ISPs were required to give notice to an offending filesharer, that notice could include some reference to the fact that the user's internet activity was being monitored and, if infringement continued, the ISP would act to terminate the user's account. This type of addition would amount to a 'repeat offender' clause under notice and notice. The industry analyst mentioned that a best-case scenario would involve GOC's provision of statutory language for such notices, eliminating confusion among rights holders and taking some of the burden of public disapproval away from ISPs.

As in music, timing is everything

18. (U) Most analysts are withholding final judgment until they can see the actual draft legislation of the amendments. However, the current political turmoil as Canada's minority government faces inquiry into a vast ethical scandal suggests that legislative language may not be available soon. One industry analyst told us that, even optimistically, it would be an example of "blinding speed" if the bill was drafted before June. If the opposition forces an election, this legislation is likely to fall behind. The development of this legislation was a major factor in decisions on Canada's Special 301 placement, and the Embassy recommended an out-of-cycle review to keep track of and encourage progress on the legislation.

A summary of the proposed amendments

9. (U) WIPO treaty issues

The proposed amendments that are intended to implement the WIPO treaties (as described by GOC) include:

- clarifying the existing exclusive communication right of authors to include control over the making available of their material on the internet;
- providing sound recording makers and performers with the right to control the making available right of their sound recordings and performances on the internet;
- making the circumvention for infringing purposes of technological protection measures (TPMs) applied to copyright material an infringement of copyright;
- making the alteration or removal of rights management information (RMI) embedded in copyright material (when done to further or conceal infringement) an infringement of copyright;
- providing rights holders with the ability to control the first distribution of their material in tangible form;
- making the term of protection for photographs the life of the photographer plus 50 years;
- introducing a full reproduction right for performers in sound recordings;
- modifying the term of protection provided to sound recording makers so as to extend to 50 years from the publication of the sound recording;
- providing performers moral rights in their fixed and live performances.

10. (U) ISP Liability

Proposed amendments concerning internet server provider (ISP) liability include:

- making ISPs exempt from copyright liability in relation to their activities as intermediaries (comment: one industry analyst worries that the phrasing of this exemption could be far too broad and might encourage the creation of small ISPs dedicated to hosting illegal copies but not-liable due to this part of the law. As with many reactions to the proposed amendments, much depends on the final phrasing of the legislative text.); and
- establishing a "notice and notice" regime in relation to the hosting and file-sharing activities of an ISP's subscriber (that is, when an ISP receives notice from a rights holder that one of its subscribers is allegedly hosting or sharing infringing material, the ISP would be required to forward the notice to the subscriber and to keep a record of the relevant information for a specified time.)

11. (U) Conclusion: The GOC's proposed amendments to the Copyright Act appear to fall short in key areas such as ISP liability and technological protection measure (TPM) circumvention and in fact may not be sufficient to bring Canada into compliance with the WIPO treaties. Canadian stakeholders are as yet unable to judge the impact of the proposed amendments because the legislative text is not available. We expect intense lobbying once the draft language is available if the draft text does not adequately address the questions of ISP liability and trafficking. Post is also watching upcoming court cases and GOC's deliberations on educational use of the internet (a question which was removed from the current proposed amendments so that the GOC can obtain further input on this contentious issue.) Post will continue to work with stakeholders and GOC agencies to encourage legislation to bring Canada into compliance with the WIPO treaties. End Conclusion.